65

Supreme Court, U.S.
FILED

07 - 314 SEP 5 - 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

STACY ANN PATTERSON,

Petitioner,

v.

INSPECTOR GEN PA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STACY ANN PATTERSON
408 South Enola Drive
Enola, PA 17025
(717) 732-1706
Petitioner Pro Se

Wright Appellate Services 0814
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

QUESTIONS PRESENTED FOR REVIEW

This case presents important issues of law involving the burden of proof in an adverse employment action involving discrimination and waiver of immunity, and the dangerous precedent established by the Third Circuit. The Third Circuit deviated from this Court's and other jurisdictions in applying the burden of proof and persuasion in a Title I and Title VII case at the motion to dismiss stage. Such a different standard is against public policy and will only cause claimants to forum shop. A unified standard of proof must be applied. By misapplying the standards of proof, the lower courts erred to recognize the material disputed facts of the Petitioner's Title I and Title VII. Even though her claims also involved violations of Pennsylvania's statutes, the thrust of the Petitioner's complaint referenced violations of federal statutes as well. The Employer waived immunity and thus jurisdiction was appropriate in the federal courts. If the Writ is denied, then a new standard for claimants to allege detailed facts in their complaints and defeat the purpose of discovery would be required.

Furthermore, instead of preventing a state agency from conducting further discriminatory practices, the lower courts allowed an impermissible defense of immunity even though it was waived.

Thus, the Writ must be granted to address this salient issue.

I. WHETHER THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF THE BURDEN OF PROOF IN GENDER AND DISABILITY DISCRIMINATORY CLAIMS INVOLVING A STATE EMPLOYER AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT IN VIOLATION OF THE CONSTITUTION?

II. WHETHER THE LOWER COURTS FAILED TO PROPERLY ASSESS THE WEIGHT OF THE WAIVER OF IMMUNITY ISSUE THEREBY PREVENTING THE PETITIONER'S RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of the Basis of Jurisdiction of the Supreme Court 2

Constitutional, Statutory and Ordinance Provisions Involved in This Case 2

Statement of the Case 4

Statement of Facts 6

Argument in Writ of Certiorari 8

I. The Lower Courts Deviated From Supreme Court Cases and Fractured The Law Of The Burden of Proof In gender and Disability Discriminatory Claims Involving A State Employer and Erroneously Granted The Employer's Motion for Summary Judgment Since There Existed Material Issues Of Disputed Facts That Should Have Been Resolved By A Trier of Fact in Violation of The Constitution 8

II. The Lower Courts Failed To Properly Assess The Weight of The Waiver of Immunity Issue Thereby Preventing The Petitioner's Right To A Jury Trial In Violation of the Constitution 20

Conclusion 25

TABLE OF AUTHORITIES

Cases:

Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006) 10

Beard v. Annis, 730 F.2d 741, 743 (11th Cir. 1984) 10

Birone v. Indian River Sch., 145 F.3d 1329 (1998) 11

Chauffeurs, Teamsters and Helpers v. Terry, 110 S.Ct. 1339, 1344-45 (1990) 18

City of Monterery v. DelMonte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999) 19

Cline v. Catholic Diocese of Toledo, 206 F.3d 6512, 657 (6th Cir. 2000) 9

Conley v. Gibson, 355 U.S. 41, 46 (1957) 9

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) 18

Foman v. Davis, 371 U.S. 178, 182 (1962) 10

Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994) 15

Grand Chute v. Winegar, 82 U.S. 373, 375 (1872) 17, 18, 23

Hill v. City of Scranton, 411 F.3d 118, 125 (3d Cir. 2005) 10

Hunt v. Cromartir, 526 U.S. 541 (552 U.S. 1999) 18

Jacob v. New York City, 315 U.S. 752, 752-753 (1942) 17, 18, 23

Jones v. Smith, 99 F.R.D. 4 (1983) 9

Kozlowski v. Ferrari, 117 F.Supp. 650 (1954)..... 9

Markman v. Westview Instruments, Inc., 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995) 19

May Dep't Stores v. Walton, 527 f.2d 1275 (1978) 22

McClain v. NorthWest Community Corrections Center Judicial Corrections Bd, 440 F.3d 320, 332 (6th Cir. 2006) 13

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) 13

Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982) 17, 23

Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992) 13

Moore v. Coats Co, 270 f.2d 410, 412 (3rd Cir. 1959)..... 10

Mullane v. Central Hanover Bankd & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) .. 17, 23

Oncale v. Sundowner Offshore Services, 66 U.S.L.W. 4172 (U.S. March 5, 1998)..... 12

Petitti v. New England Telephone and Telegraph Co., 909 F.2d 28, 34 (1st Cir. 1990) 15

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000) 14

Scheuer v. Rhodes, 416 U.S .233, 236 (1974) 15

Shaner v. Synthes, 204 F.3d 138, 142 93rd Cir. 1998) 16

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981) 15

Torre v. Casio, Inc., 42 F.3d 825, 830 (3rd Cir. 1994) 15

Tysinger .v Police Department of City of Zanesvile, 463 F.3d 569, 576 (6th Cir. 2006) 13

United States v. Mitchell, 445 U.S. 535, 538-39, 100 S.Ct. 1349, 1351-52, 63 L.Ed.2d 607 (1980) 21

United States v. Nordic Village, Inc., 112 S.Ct. 1011, 1014-15, 117 L.Ed.2d 181 (1992) 21

Wright v. Murray Guard, Inc, 455 F.3d 702, 707 (6th Cir. 2006) 13

Wright v. West, 505 U.s. 277, 296, 112 S.Ct. 2482 (1995) 14

Statutes:

28 U.S.C. § 1653 10

28 U.S.C. Section 1254 2

38 U.S.C. § 1820(a)(1) 22

42 Pa.C.S.A. §§ 951-963 7

42 U.S.C. § 12102(2) 17

42 U.S.C. § 12111(8) 16

42 U.S.C. § 12112(a) 4, 16

42 U.S.C. § 2000e-16 21

42 U.S.C. Section 1983 3

42 U.S.C. Section 2000e 3

42 U.S.C. Section 2000e-2 ..... 3, 21

43 Pa.Stat.Ann § 951-963 (2003) 8

Constitutional Provisions:

Seventh Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

Other Authorities:

Supreme Court's Construction of Due Process: 77 L.Ed.2d 1485 (1999) 17

APPENDIX

Page

Appendix A –Sur Petition for Rehearing En Banc, dated July 6, 2007 ..... 1a

Appendix B –Judgment, dated June 15, 2007 ..... 3a

Appendix C – Opinion, filed June 15, 2007 ..... 5a

Appendix D – Memorandum and Order, dated August 23, 2006 ..... 9a

OPINIONS BELOW

The decision of the United States District Court of Pennsylvania dated August 23, 2006 is set forth in the Appendix. (9a-13a).

The United States Court of Appeals for the Third Circuit's Judgment and Opinion dated June 17, 2007 are set forth in the Appendix. (3a-8a).

A Petition for Rehearing En Banc was presented before the Third Circuit and was then denied on July 6, 2007. See Appendix. (1a-2a).

This Writ is timely filed.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its final decision on June 15, 2007. (5a-8a). A Petition for Rehearing En Banc was denied on July 6, 2007. (1a-2a). This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATUTORY PROVISIONS

42 U.S.C. Section 1983, Civil Rights:

Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected,...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. Section 2000e-2:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq.

42 U.S.C. Section 2000e provides:

Section 2000e. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any indi-

vidual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color.

Title I of the Americans with Disabilities Act ("ADA")
42 U.S.C. §12112(a)

"a qualified individual with a disability because of the disability of such individual in regard to…hiring, advancement, or discharge."

STATEMENT OF THE CASE

Procedural History

Stacy Ann Patterson, the Petitioner, filed a complaint in the United States District Court for the District of Pennsylvania on December 8, 2005 for discrimination and sexual harassment against the Pennsylvania Office of Inspector General, the "Employer".[1]

On April 4, 2006, the District Court granted the Defendant's motion for a more definitive statement and directed the plaintiff to file an amended complaint; the court erroneously thought that the Petitioner had not filed a response and supplemental documentation. After the Order, the court clerk's office realized that the Petitioner had in fact filed a

---

[1] Patterson complied with the administrative process of filing a complaint with the EEOC as well as the Pennsylvania Human Relations Commission.

document in response to the Employer's motion on March 30, 2006, but the clerk did not enter it until April 4, 2006.

After review of the documents submitted by the Petitioner, the Court stated that she still failed to cure the alleged deficiencies of her complaint and was directed to file an amended complaint on April 6, 2006.

Thus, on April 21, 2006, the Petitioner filed an amended complaint listing a violation of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.Stat.Ann. §951-963 (2003), as a cause of action and naming the Commonwealth of Pennsylvania, Office of Inspector General as a defendant.

Thereafter, the Employer filed a Motion to Dismiss and the Petitioner filed an Opposition. On August 23, 2006, the District Court granted the motion and dismissed the Petitioner's complaint. (9a-13a).

Thus, the Petitioner filed a Notice of Appeal to the Third Circuit Court of Appeals on September 22, 2006. The appeal sought a reversal of the dismissal of her action and a trial on the merits of her claim.

The Third Circuit affirmed the District Court's decision on June 15, 2007. (3a-8a). Thereafter, the Petitioner filed a Petition for Rehearing En Banc. On July 6, 2007, the Third Circuit denied the Petition. (1a-2a).

Therefore, given the constitutional and public policy issues involved in this case, the Petitioner files this Writ and seeks relief.

STATEMENT OF FACTS

Stacy Ann Patterson, the Petitioner, was hired by the Pennsylvania Office of Inspector General (the "Employer"), on January 18, 2000, as an Information Technology Technician.

When she was hired, the Employer was informed of the Petitioner's perceived disability of hydrocephalus. The perceived disability caused damage to her right optic nerve and she has no depth perception. Also, due to an accident in 1998, the Petitioner suffered from a mental impairment.

Even after she was hired, in January of 2000, the Petitioner notified her immediate supervisor at the time, Berney Ortiz, of her perceived disability. Several months later, in April 2000, the Petitioner again notified Mr. Ortiz as well as her team leader Dennis Lauer of her perceived disabilities. Approximately a year later in March 2001, the Petitioner notified her bureau director, Michael Hayes, who had just become her acting immediate supervisor pending the results of the internal investigation. Mr. Hayes had started when the Petitioner blew the whistle on March 12, 2001. Thereafter in November 2001, she notified her then current supervisor, Bill Barrett, of her perceived disabilities.

Even though she continuously notified her superiors of her perceived disabilities, the Petitioner was denied training necessary to satisfactorily complete her duties. As a result of the lack of training, she was given unsatisfactory reviews.

Moreover, from January 2000 to March 2001, Mr. Ortiz, her former supervisor, sexually harassed the Petitioner and

forced her to have a sexual relationship with him. After the Petitioner signed her first official job description in November 2000, Mr. Ortiz began issuing unsatisfactory interim performance reviews. After the Petitioner received two unsatisfactory interim performance reviews as well as an unsatisfactory annual performance review, the Petitioner reported the sexual harassment to Mr. Hayes in March of 2001. Even though Mr. Hayes was allegedly conducting an investigation, the Petitioner was being denied training in order to conduct her duties. The Petitioner's co-workers were not denied training.

In order to be promoted and reclassified to a Distributed Systems Specialist I, as were her co-workers, the Petitioner would have had to attend training seminars. However, the Employer failed to allow her to be trained, and thus, she could not be promoted or perform her duties properly as her co-workers did. As a direct result of the lack of training, the Petitioner consistently received unsatisfactory ratings.

As a result of this pattern of behavior, the Petitioner filed a complaint with the Pennsylvania Human Relations Commission as well as the Equal Employment Opportunity Commission alleging disability discrimination, denial of training, denial of promotions and sexual harassment.

This case arose under 42 Pa.C.S.A. §§951-963, wherein the Petitioner claimed that her employer, the Pennsylvania Office of Inspector General ("Employer") discriminated against her by denying her training.

The Employer admitted that the Petitioner stated a number of legal issues to trigger federal jurisdiction, including viola-

tions of the equal employment, gender discrimination, and violation of the Pennsylvania Human Relations Act (the "Act"). 43 Pa.Stat.Ann §951-963 (2003).

ARGUMENT IN WRIT OF CERTIOARI

I. THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF THE BURDEN OF PROOF IN GENDER AND DISABILITY DISCRIMINATORY CLAIMS INVOLVING A STATE EMPLOYER AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT IN VIOLATION OF THE CONSTITUTION.

The lower courts erroneously placed an impermissible and unconstitutional burden upon the Petitioner at the stage of the initial filing of the complaint. This Honorable Court's review is necessary to resolve the issue of the burden of proofs in a discrimination case when there exists a failure to investigate claims of gender discrimination and disability discrimination. The Third Circuit erroneously concluded that the Petitioner did not provide evidence to prove her claim and dismissed the viable case. The lower courts failed to use the proper standard of review and assess all factual evidence and draw all reasonable inferences in favor of the

Petitioner. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 6512, 657 (6th Cir. 2000).

A dismissal ought not to be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss a complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954).

Given this high standard of proof, the Petitioner should have been given the opportunity to present her case before the jury – no jury has had the opportunity to weigh the evidence of her allegations since the District Court dismissed his claim based upon the alleged failure to produce sufficient evidence and prove waiver of immunity. By placing such an impermissible burden upon the Petitioner, her constitutional rights were violated. At the complaint stage of litigation, the Petitioner was not obligated to prove her entire case, but to provide sufficient facts of notice. If the decision is affirmed, then claimants like the Petitioner will be deterred from filing viable claims in the courts. If there was a deficiency in the complaint, since the Petitioner was filing prose, she should have been given the opportunity to amend her complaint since the Employer would have suffered no preju-

dice. *See Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Justice required that in lieu of a dismissal, the Petitioner's complaint be allowed to be amended to add the additional defendants and focus upon the violations.

Furthermore, the lower courts had the authority but refused to use under 28 U.S.C. §1653 that permitted an amendment to the pleadings to cure defects in jurisdictional allegations. In Berkowitz v. Philadelphia Chewing Gum Corp., 303 F.2d 585, 587 (3rd Cir. 1962). Even though amendments should be liberally granted, the lower courts failed to exercise that discretion and defeated the interest of justice to avoid dismissal of suits on purely technical grounds. See *Moore v. Coats Co.*, 270 F.2d 410, 412 (3rd Cir. 1959); 6 Wright & Miller, Federal Practice & Procedure §1471, p. 536 ("courts also have allowed a party to amend in order to change the nature or theory of his claim").

Rule 15 reflects an important policy of the federal rules. The rule's purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities. No longer is a party to be irrevocably bound to the legal or factual theory of her first pleading. Given the severity of the allegations of discrimination, the Defendant's motive was central to the case. Employment discrimination cases should be disposed of with dismissal only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984). The lower courts have deviated from applicable standards and burdens of proof during the stages of litigation. This Court must accept the Writ in order

that a uniformed standard of notice and burdens is established. Claimants will forum shop away from the Third Circuit since the jurisdiction requires a more stringent notice of claims process.

Instead of using extreme caution, the lower courts deviated from applicable law and dismissed a viable complaint that dealt with serious federal issues, especially since the named defendant was a state agency. The decisions below set a dangerous precedent to claimants imposing high burdens of proof as well as to minimize state actors from abiding with employment laws.

If a proper investigation was allowed to be conducted, it would have been readily apparent that the Petitioner had an adverse employment environment of being discriminated due to her gender as well as her disabilities. To constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status. *Birone v. Indian River Sch.*, 145 F.3d 1329 (1998). Of course, the Petitioner had a change of terms of her employment opportunities that was based on a discriminatory practice, but the issues could not be analyzed due to the erroneous dismissal of her case. The Petitioner could prove that she was sexually harassed and was denied training resulting in poor performance appraisals; the Petitioner was denied training due to her perceived disabilities. Of course, such action is unconstitutional.

The Petitioner must be allowed to amend the complaint to more fully explain the Employer's violations of gender discrimination, harassment and perceived disabilities. Having her complaint dismissed was severely prejudicial.

The first issue providing federal jurisdiction was the Petitioner's claims of violations of Title VII. Title VII of the 1964 Civil Rights Act prohibits "discrimination...because of...gender". *Oncale v. Sundowner Offshore Services*, 66 U.S.L.W. 4175 (U.S. March 5, 1998). For claims such as the Petitioner's which lack direct evidence of intent to discriminate, the well-established *McDonnell Douglas/Burdine*[2] burden-shifting framework applies to claims of discrimination brought under Title VII. *McClain v. NorthWest Community*

---

[2] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the standard necessary for a claimant to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff. *Id.*

Corrections Center Judicial *Corrections Bd.*, 440 F.3d 320, 332 (6th Cir. 2006)(citing *Mitchell* v. *Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992))(referencing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). "To demonstrate a prima facie case, the plaintiff must show that '(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees.'" *Wright* v. *Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). The burden would then shift to the Employer to articulate a legitimate, nondiscriminatory reason for the Petitioner's termination. *McClain*, 440 F.3d at 332. If the Employer articulated such a reason, the burden returns to the Petitioner to produce evidence from which a jury could find that the Employer's stated reason is not credible and is a mere pretext for discrimination. *Tysinger* v. *Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006).

In our facts, the circumstantial evidence was overwhelming and further discovery and investigations would have supported her claims; however, the Petitioner was never allowed the opportunity to present the facts to a jury. The Petitioner was denied training and forced into a sexual relationship with her superior. She could not properly perform her duties due to the denial of training, the failure to make accommodations due to her disability, and the force to have a relationship with her superior. Such evidence was sufficient to meet the standard of proof and overcome a dismissal.

In the case *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), this Court held that once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

Under the *Reeves* standard, once Petitioner met the four *McDonnell* criteria, then if the Court finds that the Employer's explanation of its actions not to be credible, there must be a finding of discrimination. There is no more shifting of burdens of proof and persuasion back to Petitioner. The Employer has never cited proper reasons for the termination – an underperformance could not be justified since the Employer failed to provide proper training for the position to the Petitioner and never accommodated her for her disabilities. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination even though it is persuasive. *St. Mary*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1995). As emphasized, it is the trier of fact,

and not the judge on a motion to dismiss, to weigh the credibility of the explanation.

If given the opportunity, the Petitioner would submit substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994). Given the totality of the circumstances, the Petitioner met her burden of proof. However, her opportunity to further investigate and develop the discriminatory practices was wrongfully taken away by the dismissal. At the stage of litigation, the court must determine whether the Petitioner is entitled to offer evidence in support of her allegation. *See Scheuer v. Rhodes*, 416 U.S. 233, 236 (1974). The Petitioner offered evidence with her detailed complaint.

The Petitioner's explanation of its legitimate reasons of adverse employment action must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). The Employer has never provided any reasonable response. However, these facts cannot be analyzed due to the wrongful dismissal of the Petitioner's complaint. Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Obviously, the Employer's motive and intent were central issues to the underlying cause of action.

In our facts, the basis of the Petitioner's termination was her poor performance appraisals. However, the underlying

reasons of the appraisals demonstrate that the Employer's statement was unreasonable. The Petitioner received poor reviews due to her denial of training in order to learn and better her duties; she received poor reviews due to her unwillingness to continue a relationship with her superior; and she received poor grades due to the Employer's failure to accommodate for her known perceived disabilities. Such circumstantial and direct evidence overcome the initial burden of proof and discredit the Employer's non-discriminatory purpose. Jurisdiction was proper in the federal court for violations of Title VII.

The second count for federal jurisdiction in which the Petitioner met her burden of proof was a violation of the American with Disabilities Act. Title I of the Americans with Disabilities Act ("ADA") prohibits discrimination against "a qualified individual with a disability because of the disability of such individual in regard to...hiring, advancement, or discharge." 42 U.S.C. §12112(a). A qualified individual is a person who "with or without reasonable accommodation can perform the essential functions" of the job in question. 42 U.S.C. 12111(8). When a person alleges employment discrimination under the statute, she must meet a three prong test: 1) she is "disabled" as that term is defined within the statute; 2) is otherwise qualified to perform the essential functions of the job, with or without a reasonable accommodation by the employer; and 3) has suffered an adverse employment action. *Shaner v. Synthes*, 204 F.3d 138, 142 (3rd Cir. 1998).

In our facts, it was well documented that the Petitioner had a disability that was known to the Employer. The Employer

failed to make any accommodations as well as denied her training. As a result of these actions, the Petitioner received poor performance appraisals affecting her career. Disability is defined as: a) an impairment that substantially limits a major life activity; b) a record of a substantially limiting impairment; and c) being regarding as having a substantially limiting impairment. 42 U.S.C. §12102(2). The Petitioner made it very clear from the beginning of her employment that she was disabled and her vision was impaired. The Employer violated Title I, a federal statute, and thus, the jurisdiction was proper in the federal courts.

If the decisions are upheld, claims, such as that of the Petitioner, would never reach the jury thereby violating constitutional rights. So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City,* 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* Petitioner's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard. Due Process Clause of the Fourteenth Amendment. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied the basic constitu-

tional concepts – Petitioner was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation. Instead her case was dismissed at the initial stage because the improper burden was imposed.

In *Hunt v. Cromartir*, 526 U.S. 541 (552 U.S. 1999), this court reminded the lower courts again that before granting a dismissal, they must not weigh evidence and assess credibility of the parties or evidence because that belongs to the jury. In addition, the court noted that "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." Rather than following this guide line and standard, the lower courts deviated by making findings of facts, assessing credibility of witnesses and evidence and weighing the evidence in light most favorable to the Employer.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935*); Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872*); Jacob v. New York City,* 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the draft-

ers of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. Del-Monte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999).

Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard of violations of Title VII and the burdens necessary to overcome summary judgment.

A review of the District Court's and Third Circuit's opinions demonstrate that they deviated from other jurisdictions.

The lower courts heightened the burden for Petitioner to prove a discriminatory employment adverse action at the complaint stage. Also, immunity was improperly invoked.

Therefore, the Petitioner respectfully requests that the decisions below be vacated or in the alternative the case remanded, reinstated in the District Court's docket so that discovery may be conducted.

II. THE LOWER COURTS FAILED TO PROPERLY ASSESS THE WEIGHT OF THE WAIVER OF IMMUNITY ISSUE THEREBY PREVENTING THE PETITIONER'S RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION.

In our facts, the Employer waived immunity and as such the Petitioner properly pursued her case in the federal court jurisdiction. The Employer admitted that the Petitioner named a number of federal violations in her complaint. Therefore, there should have been no jurisdictional issue. Moreover, since the Employer admitted federal issues as well as comply with the rule requirements, any defense of immunity should have been barred. To affirm the decisions before would only place an egregious burden upon claimants in filing in the federal courts when federal issues are involved. Such a result is unconstitutional and against public policy.

Title VII of the Civil Rights Act of 1964 specifically prohibits employment discrimination based on race, color, relig-

ion, sex or national origin. 42 U.S.C. §2000e, et. seq. Congress extended the benefits of Title VII to federal employees in 1972 by explicitly waiving the United States' Sovereign Immunity in 42 U.S.C. §2000e-16. The congressional intent was clear in waiving the immunity; it provided exclusive judicial remedy for claims of discrimination in federal employment. *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976).

The courts below completely disregarded the waiving of immunity by not allowing the case be pursued on its merits. Instead, the courts agreed that it lacked subject matter jurisdiction upon two of the defendants. Even though the Petitioner met the requirements to trigger federal jurisdiction, her case was erroneously dismissed. If there was any deficiency, the District Court should have allowed the Petitioner to amend the complaint and more fully explain the discriminatory pattern due to her gender and perceived disability. The facts of the case clearly explain what occurred during her employment. Thus, the Employer, a state agency, cannot claim immunity with such clear violations of federal law and statutes.

The Supreme Court has insisted that language waiving sovereign immunity be clear and unequivocal. *United States v. Mitchell*, 445 U.S. 535, 538-39, 100 S.Ct. 1349, 1351-52, 63 L.Ed.2d 607 (1980); *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1014-15, 117 L.Ed.2d 181 (1992).

The employees named as defendants acted beyond the scope of their employment, important facts that needed to be presented to a trier of facts. Even though they were state

agency employees, federal causes of action were being pursued against each defendant. Thus, judicial economies and jurisdiction allow the case to be pursued in federal court, especially in light of the federal statute violations. The Employer is not immune from liability and suit, and the waiver of immunity must be applied in the current facts. The Petitioner sufficiently alleged violations of discrimination based on gender and perceived disabilities and was sexually harassed at the workplace, which clearly constitute federal causes of action.

The legislative history with respect to the Reaffirmation of Congressional Intent with Respect to Limited Waiver of Sovereign Immunity, Section 404 (38 U.S.C. §1820(a)(1)), reaffirms the intent of the Congress which permits suits by and against the administrator of an agency. In *May Dep't Stores v. Walton*, 572 F.2d 1275 (1978), the court held that whether a party waived its immunity depends upon its intention.

The Employer must be denied with the defense of immunity based on the facts established in the complaint. If the defense of immunity is upheld, then the Petitioner's constitutional rights would have been violated.

This case deals with the Petitioner's property interest (i.e. her reputation and profession) that must be protected by the state under the United States Constitution. By having her case dismissed, the Petitioner was prevented from having a full investigation via discovery, a trial on the merits, and the interests in her property protected.

As stated in the previous section, maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick, supra; Chauffeurs, Teamsters, supra.* So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). Even though the Employer waived immunity, it improperly pursued the defense and swiped away the Petitioner's opportunity to present her case to a jury.

The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

The Petitioner's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard due to the allegations of violation of discrimination by her employer, a federal agency. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). The Petitioner's claims have such significance—her lost of

benefits, wages, status, reputation and professional well-being.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower court misapplied the basic constitutional concept – the Petitioner was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation and defend her interest in her property of her reputation.

Moreover, the waiver of immunity of the Title VII and Title I must work together. The Petitioner must not be presenting similar facts in separate courts. Given the record as a whole, the Employer has waived immunity. To not enforce the waiver of immunity is against public policy and unconstitutional. A claimant would not be able to pursue cases in the federal courts even though there is proper jurisdiction. A claimant sometimes has a choice of jurisdiction. In our facts, the Petitioner made a proper choice in pursuing her claims in federal court since there was a clear waiver of immunity.

CONCLUSION

For the foregoing reasons, Stacy Ann Patterson, the Petitioner, respectfully requests that this Honorable Court grant this Writ for Certiorari so that the Third Circuit applies the proper standard of proof, or in the alternative, direct the District Court to allow the case to proceed to discovery and trial, and such other relief that the Court deems just and proper.

Respectfully submitted,

Stacy Ann Patterson,
The Petitioner
Pro Se

APPENDIX A – SUR PETITION FOR REHEARING EN BANC, DATED JULY 6, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

06-4233

STACEY ANN PATTERSON,

Appellant

v.

PA OFFICE OF INSPECTOR GENERAL

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges, and ROTH, Senior Circuit Judge*

---

* As to panel rehearing only.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service no having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: July 6, 2007
tyw/lml/cc: Ms. Stacy Ann Patterson
Calvin R. Koons, Esq.

APPENDIX B – JUDGMENT, DATED JUNE 15, 2007

No. 06-4233

STACY ANN PATTERSON,

Appellant

v.

PA OFFICE OF INSPECTOR GENERAL

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 05-cv-02549)
Magistrate Judge: Honorable Malachy E. Mannion

Submitted Under Third Circuit LAR 34.1(a)
April 2, 2007

BEFORE: BARRY, CHAGARES and ROTH, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on August 23, 2006 be, and the same is, hereby affirmed.

Costs taxed against appellant. All of the above in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: June 15, 2007

APPENDIX C – OPINION, FILED JUNE 15, 2007

No. 06-4233

STACY ANN PATTERSON,

Appellant

v.

PA OFFICE OF INSPECTOR GENERAL

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 05-cv-02549)
Magistrate Judge: Honorable Malachy E. Mannion

Submitted Under Third Circuit LAR 34.1(a)
April 2, 2007

BEFORE: BARRY, CHAGARES and ROTH, CIRCUIT JUDGES

(Filed June 15, 2007)

OPINION

PER CURIAM

Appellant Stacy Ann Patterson filed a civil complaint in United States District Court for the Middle District of Pennsylvania in which she claimed that her employer, the Pennsylvania Office of Inspector General ("OIG"), discriminated against her, by denying her training, in violation of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons.Stat.Ann. §§ 951-963. Patterson was hired on January 18, 2000 as a Information Technology Technician. Because the original filing did not state a basis for federal jurisdiction, the OIG filed a motion for a more definite statement, asking Patterson to clarify whether her claim of discrimination was brought under 42 U.S.C. § 1983, Title VII of the Civil Rights Act, 42 U.S.C. 2000e-2000e-17, the PHRA, Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., or some other law.

The motion was granted and Patterson was directed to file an amended complaint. She then filed an item consisting of 196 numbered paragraphs, App. 33-51, which we will refer to as the amended complaint, in which she indicated at ¶¶ 186-88 and 191 that she was discriminated against in violation of § 5 of the Pennsylvania Human Relations Act on account of her perceived disabilities of Hydrocephalus, Epilepsy, and Post-Concussion Syndrome. At ¶¶ 121-23, Patterson described a sexual relationship with her supervisor, and at ¶ 136, she stated that the had threatened to discipline her for unsatisfactory performance, but there was no mention of Title VII itself.

The OIG moved to dismiss the amended complaint on the basis of the Eleventh Amendment, a motion which Patterson opposed in writing. Her written opposition did not, however, address the OIG's immunity argument. In an order entered on August 23, 2006, the Magistrate Judge dismissed the amended complaint under Federal Rule of Civil Procedure 12(b)(6), reasoning that a suit against the OIG for violating the state Human Relations Act was barred by the Eleventh Amendment.[1] Patterson appeals.

We will affirm. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our standard of review is plenary. *See Gould Electric, Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). The Eleventh Amendment precludes suits against a state in federal court by citizens of that state or other states. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). A state may consent to a suit against it in federal court and thereby waive its immunity, but Pennsylvania has not done so, having specifically withheld consent, 42 Pa.Cons.Stat.Ann § 8521(b). Therefore, Patterson's suit against the OIG under the state Human Relations Act may only be brought in state court. See Mansfield State College Kovich, 407 A.2d 1387, 1388 (Pa.Commw. Ct. 1979).

Patterson has argued in her brief on appeal that Congress abrogated the states' Eleventh Amendment immunity in passing Title VII of the Civil Rights Act, and that the Magistrate Judge should have allowed her to amend her complaint

---

[1] The parties consented to proceed before a Magistrate Judge, 28 U.S.C. § 636(c)(1).

to "more fully explain the discriminatory pattern due to her gender and perceived disability." (Appellant's Brief, at 25.) However, a suit under Title I of the Americans with Disabilities Act would also have been barred by the eleventh Amendment. See Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001). In addition, although it is true that congress abrogated the states' Eleventh Amendment immunity in passing Title VII, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), Patterson was not prevented from amending her complaint as of right under Federal Rule of Civil Procedure 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served."), in response to OIG's motion to dismiss if it was in fact her intention to pursue a Title VII claim for gender discrimination, 42 U.S.C. § 2000e-2(a)(1), based on an incident or incidents of sexual harassment.

We will affirm the order of the District Court dismissing the amended complaint.

APPENDIX D – MEMORANDUM AND ORDER, DATED AUGUST 23, 2006

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

STACY ANN PATTERSON,	**: CIVIL ACTION No. 1:05-2549**	
Plaintiff	**:**	
v.	**:**	**(MANNION, J.[1])**
PA OFFICE OF INSPECTOR GENERAL[2],	**:**	
Defendant	**:**	

---

[1] The court notes that this action was originally assigned to Judge Conner and referred to the undersigned for consideration of all pre-trial matters. In the Joint Case Management Plan filed by the parties on June 6, 2006, the parties indicated that they consented to the jurisdiction of a magistrate judge, with the election of Harrisburg as a desired location. (Doc. No. 20). As a result, by order dated June 7, 2006, the case was reassigned to Judge Smyser. (Doc. No. 21). However, by correspondence filed on June 13, 2006, the plaintiff indicated that she did not consciously join in the request that the matter be reassigned to the undersigned by order of Judge Smyser dated July 24, 2006. (Doc. No. 27).

[2] In a Joint Case Management Plan filed with the court on June 6, 2006, the plaintiff indicated that she intended to join "John Zerance" and "Joseph Koshinskie" as parties to this action. (Doc. No. 20). However, as of this date, the plaintiff has not sought to amend her complaint to include these individuals, no does the record reflect that either of these individuals has been served.

MEMORANDUM AND ORDER

Presently pending before the court is the defendant's motion to dismiss the plaintiff's complaint. (Doc. No. 16). Based upon the court's review of the record in this action, the defendant's motion will be granted.

By way of background, on December 8, 2005, the plaintiff, proceeding *pro se*, commenced this action pursuant to the Americans With Disabilities Act, ("ADA"), 42 U.S.C. § 12101, *et seq.* (Doc. No. 1).

By order dated April 4, 2006, (Doc. No. 12), the court granted the defendant's unopposed motion for a more definite statement, (Doc. No. 10), and directed the plaintiff to file an amended complaint. Subsequently, the court learned that the plaintiff had, in fact, filed a document in response to the defendant's motion on March 30, 2006, but it was not entered on the docket in this matter until April 4, 2006, order. As a result, by order dated April 6, 2004, the plaintiff was again directed to file an amended complaint. (Doc. No. 14).

On April 21, 2006, the plaintiff filed an amended complaint listing the Pennsylvania Human Relations Act, ("PHRA"), 43 Pa.Stat.Ann. §§951-963 (West 2003), as the basis for her claim. The only named defendant in the amended complaint is the Commonwealth of Pennsylvania, Office of Inspector General. (Doc. No. 15).

On May 8, 2006, the defendant filed the instant motion to dismiss the plaintiff's complaint, (Doc. No. 16), along with a

brief in support thereof, (Doc. No. 17). The plaintiff filed a brief in opposition to the defendant's motion on May 22, 2006. (Doc. No. 18).

Defendant's motion to dismiss is brought pursuant to provisions of Fed.R.Civ.P. 12(b)(6). This rule provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. Dismissal should only occur where it appears that the plaintiff can prove no set of facts in support of h[er] claim which would entitle h[er] to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accordingly, dismissal is appropriate "only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegation of the complaint." Trump Hotel and Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d cir. 1998) (citing ALA, Inc. v. CCair, Inc., 29 F.3d 855, 859 (3d Cir. 1994)).

In deciding a motion to dismiss, a court should generally consider only the allegations contained in the complaint, the exhibits attached to the complaint, matters of public record, and "undisputably authentic" documents which plaintiff has identified as the basis of his claim. See Pension Benefit Guarantee Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

It must also be remembered that when considering a motion to dismiss under Rule 12(b)(6), the important inquiry is not whether the plaintiff will ultimately prevail on the merits

of his claim, but only whether [s]he is entitled to offer evidence in support of them. Scheuer v. Rhodes, 416 U.S. 233, 236 (1974).

In it's motion to dismiss, the defendant argues that it is immune from suit under the Eleventh Amendment. (Doc. No. 17, pp.3-4). With respect to this argument, as a Commonwealth agency, the office of Inspector General possess immunity in federal court for claims under the PHRA. Williams v. Pennsylvania State Police Bureau of Liquor Control Enforcement, 108 F.Supp.2d 460, 465 (E.D.Pa.2000). Pennsylvania has, however, waived sovereign immunity in its own courts under the PHRA. Mansfield State College v. Kovich, 407 A.2d 1387, 1388 (Pa. Cmwlth. 1979). It has not, however, waived Eleventh Amendment immunity from suit in federal court under the PHRA. Dennison v. Pennsylvania Dept. of Corrections, 268 F.Supp.2d 387, 405 (M.D.Pa.,2003)(citing Irizarry v. Commonwealth, 1999 WL 269917, at 4 (E.D.Pa. Apr. 19, 1999)). Therefore, the court will grant the defendant's motion to dismiss the plaintiff's complaint[3].

---

[3] Although not alleged in her amended complaint, in other documents before the court, the plaintiff alleges violations of her Fifth and Fourteenth Amendment rights by the defendant. To this extent, the plaintiff's claims would be brought pursuant to 42 U.S.C. § 1983, and would also be barred by Eleventh Amendment immunity. Federal courts can not consider suits by private parties against states and their agencies unless the state has consented to the filing of such a suit. Atascadero State Hospital v. Scanlon, 473 U.S .234, 241 (1985); Edelman v. Jordan, 415 U.s. 651, 662 (1974). This immunity extends to suits asserting civil rights viola-

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

(1) the defendant's motion to dismiss the plaintiff's amended complaint, **(Doc. No. 16), is GRANTED** without prejudice to her ability to re-file the action in state court, if appropriate.

(2) the clerk is directed to close this case.

S/ Malachy E. Mannion
MALACHY E. MANNION
United States Magistrate, Judge

Date: August 23, 2006

---

tions where the state is named as defendant. Laskaris v. Thornburgh, 661 F.2d 23, 26 (3d Cir. 1981). "Under the Eleventh Amendment, a plaintiff other than the United States or a state may not sue a state in federal court without the latter state's consent unless Congress abrogates the state's Eleventh Amendment immunity pursuant to a constitutional provision granting Congress that power." Chittister .v Dep't of Community & Economic Dev., 226 F.3d 223, 226 (3d Cir. 2000). The Commonwealth of Pennsylvania has not waived its rights under Eleventh Amendment. "By statute Pennsylvania has specifically withheld consent [to be sued]." Laskaris, 661 F.2d at 25 (citing Pa.Cons.Stat.Ann §§8521(b)). Additionally, §1983 does not abrogate the Eleventh Amendment. Quern v. Jordan, 440 U.S. 332, 345 (1979). Further, an essential element of any claim under § 1983. "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

13

FILED
NOV 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-314

IN THE

Supreme Court of the United States

STACY ANN PATTERSON,

Petitioner,

v.

INSPECTOR GENERAL PA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

STACY ANN PATTERSON
408 South Enola Drive
Enola, PA 17025
(717) 732-1706
Petitioner Pro Se

Wright Appellate Services 0814
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Petition for Rehearing 1

Argument in Support of Petition for Rehearing 2

A. The Petitioner Has Alleged An Intervening Circumstances Of A Substantial Or Controlling Effect 2

B. The Petitioner's Writ of Certiorari Must Be Granted For Or to "Other Substantial Grounds Not Previously Presented" 5

Conclusion 10

Certificate of Petitioner 11

TABLE OF AUTHORITIES

Cases:

Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 773 (1942) 3

Barrera-Leyva v. INS, 653 F.3d 379, 380 (9th Cir. 1981) 4

Brandenburg v. Ohio, 395 U.S. 444, 449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) 8

Campbell v. Town of Southern Pines, 2005 U.S. Dist. LEXIS 38488, *27 n..6 (M.D.N.C. 2005) 5

Connick v. Myers, 461 U.S. 138 (1983) 6, 7

Davis v. Roadway Express, Inc., 621 F.2d 775, 776 (5th Cir. 1980) 4

Flynn v. United States, 75 S.Ct. 285, 286 (1955) 3

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 6

Morse v. Frederick, 127 S.Ct. 2618, 168 L.Ed. 2d 290 (2007) 8

Oleyear v. County of Durham, 336 F.Supp.2d 512, 517-18 (M.D.N.C. 2004) 4

Perry v. Sinderman, 408 U.S. 593 (1972) 6

Pickering v. Board of Education, 391 U.S. 563 (1968) 6

Rankin v. McPherson, 483 U.S. 378, 388-392 (1987) 7

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) 8

Rumsey Indian Rancheria of Wintun Indians v. Wilson, 99 F.3d 321, 322 (9th Cir. 1996) 8

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 524, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969) 7, 8

United States v. Ohio Power Co., 351 U.S. 980 (1956) 3

Vail Mfg. Co. v. NLRB, 68 S.Ct. 32 (1947) 3

Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997) 4

Watters v. City of Philadelphia, 55 F.3d 886, 895 (3d Cir. 1995) 6

Other Authorities:

Supreme Court Practice 311 (8th ed. 2002) 3

PETITION FOR REHEARING

The Petitioner, Stacy Ann Paterson, (hereinafter referred to as the "Petitioner", respectfully moves this Court for an order 1) vacating its denial of the Petition for Writ of Certiorari entered on October 15, 2007, and 2) granting the Petition. As grounds for this motion, the Petitioner restates the argument made in her Writ for Certiorari as well as provides the following additional argument to meet the criteria to grant a petition for rehearing.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Rule 44 of the Rules of the Supreme Court makes clear that rehearing from a denial of a petition for writ of certiorari shall only be granted in instances in which "intervening circumstances of a substantial or controlling effect" exist or to "other substantial grounds not previously presented." Rule 44.2, Rules of the Supreme Court. This Petition for Rehearing is being timely filed within the twenty-five day period of the order denying certiorari.

As previously stated, petitions for rehearing of an order denying certiorari are generally granted in two instances. In our facts, the Petitioner has met both grounds for rehearing.

A. The Petitioner has alleged an intervening circumstances of a substantial or controlling effect.

The right to petition for rehearing of an order denying certiorari "is not to be deemed an empty formality as though such petitions will as a matter of course be denied. . . . Accordingly, on an appropriate showing that a substantial matter . . . is to be presented, appropriate opportunity should be given for

doing so." *Flynn v. United States, 75 S. Ct. 285, 286 (1955)* (Frankfurter, J., in chambers). Relying on this principle, the Court has not hesitated to postpone reconsideration of orders denying certiorari where deferral advances the interests of justice and judicial efficiency. See United States v. Ohio Power Co., 351 U.S. 980 (1956) ("continu[ing]" petition for rehearing until the following Term); see also United States v. Ohio Power Co., 353 U.S. 98, 99 (1957) (explaining deferral of rehearing petition on ground that "[w]e have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"); Vail Mfg. Co. v. NLRB, 68 S. Ct. 32 (1947) (deferring consideration of petition for rehearing of order denying certiorari).

This Court and courts of appeals have deferred resolution of petitions for rehearing where a decision in pending state court proceedings could alter the analysis. See Stern & Gressman, Supreme Court Practice 311 (8th ed. 2002) (discussing deferral of petitions for certiorari "until an imminent state court decision is rendered on a controlling issue of state law"); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 99 F.3d 321, 322 (9th Cir. 1996); cf. Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 773 (1942) (granting petition for rehearing on the ground of an intervening decision from a state court). Similarly, the courts of appeals have deferred consideration of petitions for rehear-

ing in cases where this Court has committed to resolve a potentially determinative legal question. In fact, the courts of appeals even grant petitions for deferral in highly contingent cases where this Court is merely considering whether to grant a petition for certiorari in a case that might present similar legal questions. Barrera-Leyva v. INS, 653 F.2d 379, 380 (9th Cir. 1981); Davis v. Roadway Express, Inc., 621 F.2d 775, 776 (5th Cir. 1980).

Since the crux of the Petitioner's claims involved violations of federal statutes, the Petitioner's complaint was properly filed in the federal courts. Instead of focusing upon the disturbing facts, the District Court and Third Circuit erroneously denied jurisdiction.

The Circuit Courts are divided over the jurisdiction and burden of proof in Title I and Title VII cases. Under the Seventh and Fourth Circuits' standards, the employer may be liable for the actions of the biased supervisor, even when another makes the formal decision, where the biased supervisor influenced the decision by manipulating the decision-making process or by concealing relevant information or feeding false information. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997). Oleyear v. County of Durham, 336 F.Supp.2d 512, 517-18 (M.D.N.C. 2004) (finding that if the final decisionmaker merely rubber stamps the superior's advice, liability will be imposed on the employer

based on the supervisor's influence); Campbell v. Town of Southern Pines, 2005 U.S. Dist. LEXIS 38488, *27 n.6 (M.D.N.C. 2005) (imputing liability to the employer's two managers' recommendations for termination where no independent investigation was conducted and one of the managers had made statements threatening retaliation).

Obviously as the disparity of the circuits heightened for the necessary burden of proof for a public employee in Title I and Title VII cases, the purpose of direction from the Supreme Court is necessary.

The Petitioner has alleged intervening circumstances of a substantial or controlling effect, that is the burden of proof in discrimination cases.

B. The Petitioner's Writ for Certiorari must be granted for or to "other substantial grounds not previously presented."

The Petitioner was a whistle blower during the course of her employment when she complained that her supervisor sexually harassed her and she was denied training based on her sex and known disabilities. There were no accommodations provided to her due to her disabilities. Due to the pattern of discriminatory behavior, the Petitioner complained and alerted the employer of the unconstitutional prac-

tices. Her speech caused the Petitioner to be wrongfully terminated. During an investigation of the Petitioner's complaint, she was unfairly treated and denied training to perform her duties.

The Petitioner's fundamental rights were violated since she was an employee of the state government. Citizens cannot be deprived of their fundamental rights simply because they work for the government. Connick v. Myers, 461 U.S. 138 (1983). Thus, a State cannot condition public employment on a basis that infringes upon the employee's constitutionally protected freedom of speech. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Perry v. Sindermann, 408 U.S. 593 (1972). Whether an employee's speech is constitutionally protected is determined by a two-part test articulated by this Court in Pickering v. Board of Education, 391 U.S. 563 (1968). The Pickering test asks: (1) whether the speech addresses a matter of public concern, and (2) whether the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer's interest in promoting the efficiency of the public services it performs. Pickering, 391 U.S. at 568. Thus, speech is unprotected only if its value -- as measured by the employee's and the public's interests -- is outweighed by the government's interest in effective and efficient provision of services. Watters v. City of Philadelphia, 55 F.3d 886, 895 (3d Cir. 1995).

The First Amendment protects discourse between members of the public on matters of public concern. Connick, 461 U.S. at 138. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. Id. at 146.

Furthermore, the place where the speech occurs is irrelevant. See Rankin v. McPherson, 483 U.S. 378, 388-392 (1987) (holding public employee's discharge violated First Amendment when based on comment by employee as private citizen on a matter of public concern made at work).

The Petitioner was a public employee. Her speech regarding the inappropriate behavior of sexual harassment by her employer, improper training procedures, and non-existent disciplinary process caused her to be wrongfully terminated. The Petitioner was discriminated against by her government employer since she attempted to protect not only herself but female employees.

Two cardinal First Amendment principles animate both the Court's opinion in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 524, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification. "**Discrimination** against speech because of its message is presumed to be unconstitutional . . . . When the

government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) .

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See Brandenburg v. Ohio, 395 U.S. 444, 449, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action"). Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 524, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); Morse v. Frederick, *127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007).*

The crux of the Petitioner's complaint were violations of federal statutes thereby providing proper jurisdiction to the federal courts. Moreover, her speech to notify the employer and the government of illegal conduct caused her to be wrongfully sanctioned. The Petitioner's complaint was of important public concern, since it established that the Third Circuit courts applied a different burden of

proof upon female government employees than other employees. The Third Circuit courts allowed the government to liberally raise the immunity defense after there was clear and convincing evidence of sexual harassment and discriminatory practices based on sex and disability.

As such, given this additional substantial ground, this Motion must be granted and the merits of the Petition and Motion be addressed by this Court.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the Petitioner prays that this Honorable Court vacate the order of denial and grant the rehearing of the Writ of Certiorari.

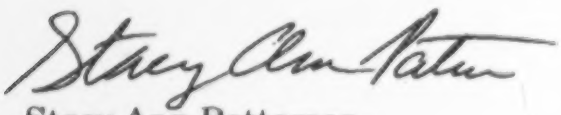
Respectfully submitted,

Stacy Ann Patterson,
The Petitioner
Pro Se

CERTIFICATE OF PETITIONER

The Petitioner certifies that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

Respectfully submitted,



Stacy Ann Patterson,
The Petitioner
Pro Se